

***United States Court of Appeals
for the Second Circuit***



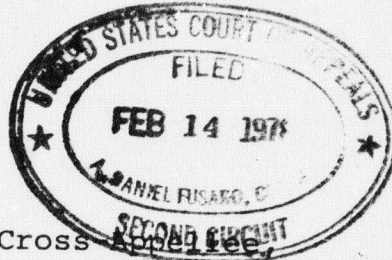
AMICUS BRIEF

ORIGINAL

77-7104

UNITED STATES COURT OF APPEALS

For the Second Circuit



DAVID E. ROLF,
Plaintiff-Appellant-Cross

against

BLYTH, EASTMAN DILLON & CO., INC.
and MICHAEL STOTT,
Defendants-Appellees-Cross-Appellants,

and

AKIYOSHI YAMADA,

Defendant.

Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR SECURITIES INDUSTRY ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-
APPELLEES' PETITION FOR REHEARING OR,
ALTERNATIVELY, SUGGESTION FOR REHEARING
IN BANC

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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DAVID E. ROLF, :

Plaintiff-Appellant-Cross-Appellee, :

v. :

BLYTH, EASTMAN DILLON & CO., INC. :
and MICHAEL STOTT :

Docket No. 77-7104

Defendants-Appellees-Cross-Appellants, :

and :

AKIYOSHI YAMADA, :

Defendant. :

- - - - -x

BRIEF OF SECURITIES INDUSTRY
ASSOCIATION, AMICUS CURIAE,
IN SUPPORT OF PETITION FOR
REHEARING OR, ALTERNATIVELY,
SUGGESTION FOR REHEARING IN BANC

The Securities Industry Association ("SIA") is a national trade association which was formed in 1972 through the merger of the Association of Stock Exchange Firms and the Investment Bankers Association of America. The SIA has approximately 439 broker-dealer members doing business throughout the United States. That membership is responsible for over 90 percent of the securities brokerage business of the nation and includes members of national securities exchanges and firms which are not members of such exchanges.

SIA's members populate all sectors of the securities industry, servicing investors of every size and type and performing the entire range of securities activities, including retail and institutional brokerage, over-the-counter market-making, underwriting and other investment banking activities, various exchange floor functions, and money management and investment advisory services. As a consequence, the SIA is generally recognized as a spokesman for the securities industry to the public and to the Government.

The panel decision rendered on January 3, 1978 (Smith and Oakes, C.J.'s) decides issues concerning the applicable standards in this Circuit for Rule 10b-5 principal liability and aider and abettor liability as applied to investment advisers, brokerage firms and their registered representatives. The panel's resolution of those issues quite probably will have a wide-ranging and adverse impact upon the securities industry and upon the effective operation of that industry.

The dissent (Mansfield, C.J.) strongly argues that the panel decision is inconsistent with the controlling precedent of Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), insofar as the panel decision, applying Rule 10b-5: 1) finds fraud on the part of an investment adviser as a result of his investment of a portion of a customer's account in allegedly "unsuitable" securities, and 2) finds aiding and abetting liability on the part of a broker-dealer and its registered

representative, serving as custodian of the customer's investment account, where the representative executed orders given by an independent investment adviser having sole discretionary authority over the customer's investments, and assured the customer of the investment adviser's expertise, which was, at the time, widely accepted in the securities industry.

The majority places a heavy burden upon brokers who, having executed securities purchases upon the direction of a highly regarded independent investment adviser, chosen by a broker's customer and possessing sole discretionary authority to select investments for that customer's account, might later be found to have aided and abetted the "fraudulent" act of purchasing "unsuitable" securities for a customer. The concept of "unsuitability" is too vague and subjective a standard upon which a finding of "recklessness" can be based to establish 10b-5 liability. Certainly, the failure of a broker to "second-guess" an independent investment adviser as to the "suitability" of securities for a customer's account, where there are no apparent reasons to question that adviser's competence and honesty, does not necessarily mean that (i) the broker is "reckless" in following that adviser's directions and expressing confidence in that adviser, and (ii) is thereby guilty of "aiding and abetting" a fraud. We believe that the dissent of Judge Mansfield, with whose legal analysis we fully agree, sets forth the more appropriate manner of determining aider and

abettor liability under Rule 10b-5 in such cases.

Furthermore, the damage standard enunciated will expose broker-dealers to enormous potential financial liability for losses suffered by customers during the time of such constructive "aiding and abetting," whether or not such losses result from the investment adviser's allegedly improper activities, or the broker-dealer rendered "substantial assistance" with respect to any of the specific transactions resulting in such losses.

The questions presented by this case, and their resolution by the panel decision are of exceptional importance to the broker-dealer members of the SIA, their registered representatives and to all broker-dealers and their registered representatives. Before this enormous burden, involving virtually unlimited potential liability, is imposed, we respectfully suggest that the Court rehear the case in banc, with opportunity for presentation of the potential impact of this decision upon the securities industry. The SIA, as amicus curiae, therefore joins defendants Blyth Eastman Dillon & Co. Incorporated and Michael Stott in their petition urging rehearing or alternatively, suggesting rehearing in banc.

Dated: New York, New York
February 1, 1978

Respectfully submitted,

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